Supreme Court, U.S.
FILED

02 357 AUG 28 2002

OFFICE OF THE CLERK

No. 02-___

In The

Supreme Court of the United States

LENWOOD MALACHI,
and
DAVID J. FITZGERALD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

NEIL E. JOKELSON, ESQUIRE
Counsel of Record

NEIL E. JOKELSON & ASSOCIATES, P.C.
230 South Broad Street
18th Floor
Philadelphia, PA 19102
(215) 735-7556
Attorney for Lenwood Malachi and David J. Fitzgerald

August 28, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

72 pp

QUESTIONS PRESENTED

1. Did double jeopardy principles as enunciated by this court in *United States v. Watts,* 519 U.S. 148 (1997) preclude Malachi and Fitzgerald from being sentenced on the basis of involvement in more than 1,000 kilograms of marijuana after they had been convicted of involvement for less than 50 kilograms of marijuana?

2. Did the lower court's refusal to recognize that a finding of drug quantity at sentencing using a preponderance of the evidence standard which quantity grossly exceeds the finding made of quantity at trial using a beyond a reasonable doubt standard conflict with this Court's prior decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and its subsequent opinion in *Harris v. United States,* 122 S. Ct. 2406 (2002)?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties – Petitioners Lenwood Malachi and David J. Fitzgerald (the defendants in the District Court), and the respondent – The United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES	ii
INDEX TO APPENDIX	iv
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL CONSTITUTION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
a. Statement of Facts	4
b. The Basis for Federal Jurisdiction in the Court of First Instance	8
REASONS FOR GRANTING THE WRIT	9
1. The decision below conflicts with this Court's prior decision in *United States v. Watts*, 519 U.S. 148 (1997), and this Court's recent decision in *United States v. Harris*, 122 S. Ct. 2406 (June 24, 2002) by refusing to apply double jeopardy principles to an acquittal on charges of a conspiracy to distribute in excess of 50 kilograms of marijuana, when the reason for such acquittal is apparent and no guesswork is necessary.	9

TABLE OF CONTENTS – Continued

Page

2. The decision below conflicts with this Court's prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its subsequent opinion in *Harris v. United States*, 122 S. Ct. 2406 (2002) by refusing to recognize that a finding of drug quantity at sentencing using a preponderance of the evidence standard, which quantity grossly exceeds the finding made of quantity at trial using a beyond a reasonable doubt standard, is improper and should not be the basis of a sentence under the Sentencing Guidelines 11

CONCLUSION 16

INDEX TO APPENDIX

A. Opinion and Order (3d Cir., January 31, 2002) ..... App. 1

B. Judgment re Lenwood Malachi (E.D. Pa., August 11, 2000) ..... App. 8

C. Judgment re David Fitzgerald (E.D. Pa., August 11, 2000) ..... App. 19

D. Transcript of Findings of Fact (E.D. Pa., February 25, 2000) ..... App. 30

E. Order (3d Cir., May 30, 2002) ..... App. 41

F. Pertinent Pages from Transcript of Sentencing Hearing (E.D. Pa., August 9, 2000) ..... App. 43

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Harris v. United States, 122 S. Ct. 2406 (2002) 11, 12, 13, 14, 15

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 12, 14

United States v. Watts, 519 U.S. 148 (1997) 9

CONSTITUTION, STATUTES AND RULES

U.S. Const., Amd. V 2, 9, 15

21 U.S.C. §841(a)(1) 2, 5, 8

21 U.S.C. §841(b)(1)(A)(vii) 2, 10

21 U.S.C. §841(b)(1)(B)(vii) 10

21 U.S.C. §841(b)(1)(D) ..... *passim*

21 U.S.C. §846 4

28 U.S.C. §1254(1) 1

28 U.S.C. §3231 8

Fed.R.Crim.P. 23(c) 5

PETITION FOR WRIT OF CERTIORARI

LENWOOD MALACHI and DAVID J. FITZGERALD respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed on January 31, 2002, affirming the District Court's judgment and commitment order.

OPINIONS BELOW

The Third Circuit's opinion (per curiam) and Order in this matter were issued on January 31, 2002. It appears in the Appendix, at App. 1-7. The Order denying rehearing was issued on May 30, 2002, and appears in the Appendix, at App. 41-42. The district court's finding of facts dated February 25, 2000 and orders dated August 11, 2000 (Harvey Bartle, J.) appear in the Appendix, at App. 8-40.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the Judgment of Sentence in the district court was filed and entered on January 31, 2002. A timely petition for rehearing was denied by order dated May 30, 2002. This Petition is timely filed. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

FEDERAL CONSTITUTION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;
> . . . .

Title 21 of the United States Code, Section 841, provides, in pertinent part:

> **§841. Prohibited acts A**
>
> **(a) Unlawful acts**
>
> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –
>
> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
>
> * * *
>
> **(b) Penalties**
>
> Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS §849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:
>
> **(1)(A)** In the case of a violation of subsection (a) of this section involving –
>
> * * *
>
> **(vii)** 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight;

* * *

(B) In the case of a violation of subsection (a) of this section involving –

* * *

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight;

* * *

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction,

> impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Title 21 of the United States Code, Section 846, provides, in pertinent part:

> **§846. Attempt and conspiracy**
>
> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

This Petition arises out of the Third Circuit's affirmance of the district court's judgments of sentence imposing a five year sentence upon petitioner Malachi and a ten year sentence upon petitioner Fitzgerald, which followed a bench trial conviction for conspiring to distribute marijuana in violation of 21 U.S.C. §841(b)(1)(D).

a. Statement of Facts

The indictment as against Petitioners consisted of a single count (Count I) charging them with participation in a single conspiracy from "1993 and lasting until 1998" wherein Malachi, Fitzgerald and numerous other co-conspirators, conspired to distribute more than one thousand kilograms of a mixture or substance containing a detectable amount of marijuana, a Schedule I controlled

substance, in violation of Title 21, United States Code, Section 841(a)(1).

Petitioners waived a jury trial and proceeded to a bench trial which lasted from January 27 to February 4, 2000. At the end of the trial, a request was made by both defendants for special findings of fact pursuant to Federal Rule of Criminal Procedure 23(c). On February 25, 2000, the District Court found both defendants guilty of Count I of the Indictment and made specific findings. The District Court, however, did not make any findings beyond a reasonable doubt on the drug quantities actually dealt with by the conspiracy nor did it make any findings beyond a reasonable doubt of drug quantities attributable to Petitioners. Sentencing was deferred pending the preparation of a presentence investigation report. It was the understanding of the Court and all counsel at that time that the issue of quantity of marijuana to be attributed to Malachi (and to his co-defendant Fitzgerald) would be determined at the time of sentencing by the Court. On June 30, 2000, this Court issued its opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On August 9, 2000, Malachi and Fitzgerald appeared for sentencing. At that time, the issue of the application of *Apprendi* was discussed by the parties and the court.

The court proceeded to sentencing without conducting an evidentiary hearing and without making any supplemental findings of fact, and noted and found as follows:

> *it was agreed that the issue of drug quantity would be deferred until the time of sentencing, if the Court found the defendant's (sic) guilty of conspiracy to distribute marijuana.* However, there was no discussion at that time about the standard of proof that would be applied should

> the Court be called upon at the sentencing hearing to decide the amount of drugs involved.
>
> * * *
>
> While the Court found beyond a reasonable doubt that the conspiracy involved large quantities of marijuana, it did not make any specific findings of drug quantity.

App. 44-45. (Emphasis added).

> The Court now finds by a preponderance of the evidence that the defendant Lenwood Malachi conspired to distribute some 3,154 pounds of marijuana; that is, some 1,400 kilograms of marijuana. So that the record is clear, the Court finds that the Government has not proven this drug quantity beyond a reasonable doubt.
>
> . . .
>
> Since the Court has found beyond a reasonable doubt that a conspiracy to distribute quantities of marijuana existed but has found the specific quantities enumerated above by a preponderance of the evidence and not beyond a reasonable doubt, the maximum sentence that can be imposed on defendant Lenwood Malachi is five years in prison under Title 21 United States Code Section 841(b)(1)(D).
>
> . . .
>
> I have found the quantity by a preponderance of the evidence and not beyond a reasonable doubt.
>
> . . .
>
> *The Government has failed to prove any specific drug quantities beyond a reasonable doubt.*

. . .

> So, you [the Government] certainly have proven that marijuana was distributed beyond a reasonable doubt, so you're in the zero plus to less than 50 kilograms category, –.

App. 45-47. (Emphasis added). This same finding was made with respect to Petitioner Fitzgerald (who also was convicted of conspiring to violate 21 U.S.C. §841(b)(1)(D)) at the same sentencing hearing, except that the district court found by a preponderance of the evidence "and *not* beyond a reasonable doubt," that he conspired to distribute 2600 kilograms of marijuana. App. 46.

Notwithstanding that a conviction under Section 841(b)(1)(D) only lies if the accused is found guilty of dealing in *less* than fifty kilograms of marijuana, the district court sentenced Malachi to five years imprisonment, finding that "the base offense level under the sentencing guidelines is 32" since Malachi, as found by a preponderance of the evidence, was involved "in the distribution of between 1,000 and 3,000 kilograms of marijuana." No enhancements were found by the court and the court found that based upon its assigning a level 32 to Mr. Malachi:

> Under the sentencing guidelines, you could be sentenced to between 121 and 151 months in prison. That's the minimum sentence under the guidelines, which would be about ten years. Nonetheless, as a result of *Apprendi versus New Jersey*, the maximum to which you are subject is five years in prison under Title 21 United States Code Section 841(b)(1)(D).

App. 48.

The district court sentenced Fitzgerald to ten years imprisonment, finding that "the base offense level in this case under the sentencing guidelines is 32." App. 47-48. Because the court found by a preponderance of the evidence that Fitzgerald was "involved in the marijuana trade to the extent of between 1,000 and 3,000 kilograms" and that he was a "supervisor of drug couriers," the court found an offense level of 35. App. 49. The court also noted that although Fitzgerald was subject to a mandatory minimum of twenty years because of a prior drug offense in New Jersey, "as a result of the Supreme Court's decision in *Apprendi versus New Jersey*, the maximum penalty in this case is ten years in prison." App. 50.

b. The Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction in the district court was founded under 28 U.S.C. §3231, which provides for the original and exclusive jurisdiction of all offenses against the laws of the United States. Petitioners were indicted, tried and convicted for offenses under 21 U.S.C. §841(a)(1).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's prior decision in *United States v. Watts*, 519 U.S. 148 (1997), and this Court's recent decision in *United States v. Harris*, 122 S. Ct. 2406 (June 24, 2002) by refusing to apply double jeopardy principles to an acquittal on charges of a conspiracy to distribute in excess of 50 kilograms of marijuana, when the reason for such acquittal is apparent and no guesswork is necessary.

This Court should grant certiorari to enforce the principle of double jeopardy under the Fifth Amendment to the United States Constitution. Here, Petitioners were sentenced on the basis of a conspiracy to distribute 1,000 to 3,000 kilograms of marijuana. However, petitioners were acquitted of a conspiracy to distribute 50 or more kilograms of marijuana. In most cases, the reasons for an acquittal cannot be reliably ascertained. Hence, this Court in *United States v. Watts*, 519 U.S. 148 (1997) held that "an acquittal does not prevent the sentencing court from considering conduct underlying the acquitted conduct" because when a general verdict of not guilty is returned "it is impossible to know exactly why a jury found a defendant not guilty on a certain charge." Accordingly, the Court found that a defendant is not twice placed in jeopardy under this sentencing procedure. Although this proposition may be true for most cases, the reasoning is not sound when applied to drug offenses such as the instant case.

In the instant case, the petitioners were found guilty of conspiring to distribute less than 50 kilograms of marijuana in violation of 21 U.S.C. §841(b)(1)(D). However,

because the district court found by a preponderance of the evidence that Malachi conspired to distribute 1,400 kilograms of marijuana and Fitzgerald conspired to distribute 2,600 kilograms of marijuana, the court imposed the maximum sentences available under Section 841(b)(1)(D). These sentences violated double jeopardy. Here, defendants were acquitted of offenses to distribute larger quantities under both Section 841(b)(1)(B)(vii) and Section 841(b)(1)(A)(vii). Because the only distinction between the marijuana crime charged in Section 841(b)(1)(D) and those charged in Section 841(b)(1)(B)(vii) involving 100 kilograms or more and Section 841(b)(1)(A)(vii) involving 1,000 kilograms or more, is the amount of marijuana involved, the only basis for the Section 841(b)(1)(D) conviction was the necessary rejection that petitioners were involved with an amount of marijuana in excess of 50 kilograms. Unlike the general proposition in that it is impossible to determine the basis for an acquittal, here, the basis was self-evident. Accordingly, double jeopardy prevents a sentence based upon amounts found by only a preponderance of the evidence to be in excess of 50 kilograms.

2. The decision below conflicts with this Court's prior decision in *Apprendi v. New Jersey*, 530 US 466 (2000), and its subsequent opinion in *Harris v. United States*, 122 S. Ct. 2406 (2002) by refusing to recognize that a finding of drug quantity at sentencing using a preponderance of the evidence standard, which quantity grossly exceeds the finding made of quantity at trial using a beyond a reasonable doubt standard, is improper and should not be the basis of a sentence under the Sentencing Guidelines.

The Third Circuit in its opinion filed July 31, 2002 found that this Court's Opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not proscribe the sentencing of petitioners based upon a quantity finding of marijuana in excess of that finding for which they were convicted because the sentences imposed were within the statutory range. It is respectfully suggested that such analysis is constitutionally infirm in light of this court's recent opinion in *Harris v. United States*, 122 S. Ct. 2406 (2002). The court below reasoned :

> In *United States v. Williams*, 235 F.3d 858 (3d Cir. 2000), we held *Apprendi* does not apply where a relevant factor raises the maximum statutory penalty, so long as the sentence actually imposed remains at or below the maximum applicable when the factor is not established beyond a reasonable doubt. *Id.* at 863. Because the District Court here imposed a sentence within the maximum statutory range for trafficking less than fifty kilograms of marijuana, *Apprendi* does not apply.

App. 3-4.

This conclusion by the court below is belied by the analysis in *Harris*. While both *Apprendi* and *Harris* recognized that sentencing factors may be used, in conjunction with the sentencing guidelines to sentence a defendant up to the statutory maximum, the real question that this court grappled with in *Harris* was whether an "enhancement" was an element of the crime or a sentencing factor. The Court wrote in *Harris*:

> Yet not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

122 S. Ct. at 2410.

In making the distinction between elements of the crime and sentencing factors, this court further noted in *Harris* with reference to its prior opinion in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

> . . . *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum

> authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory minimum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution.

122 S. Ct. at 2414. This Court then went on to note that:

> Petitioner argues, however, that the concerns underlying *Apprendi* apply with equal or more force to facts increasing the defendant's minimum sentence.
>
> * * *
>
> *The answer is that because it is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury*, a factual finding's practical effect cannot by itself control the constitutional analysis.
>
> * * *
>
> If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury – even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would

> have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

122 S. Ct. at 2418-2419. (Emphasis supplied).

Inherent in the verdicts and convictions of the petitioner for violation of 21 U.S.C. §841(b)(1)(D) and not some other offense under Section 841 was the recognition that the petitioners were found by the finder of fact not guilty of the allegation as set forth in the indictment that they dealt in more than fifty kilograms of marijuana. To disregard this finding which is in effect the equivalent of a jury-based finding and then to sentence petitioner on an enhanced basis based upon a quantity finding made at sentencing using a preponderance of the evidence standards flies in the face of this Court's analysis in *Harris*. By having quantity determined at trial, it could not reasonably be argued that a new and greater determination of quantity could be made as a sentencing factor. Marijuana quantity under the structure of Section 841 is an element of the crime which once ascertained preempts a different determination for sentencing purposes. Since the quantity of marijuana under Section 841 and *Apprendi* is an element of the crime, a different determination finding a quantity for sentencing purposes should not be made as such a determination is not a "sentencing factor." This court expressly noted that principle in *Harris* during its discussion of *McMillan*:

> The evidence . . . that punishment was, by law, tied to the offense . . . and the evidence that American judges have exercised sentencing discretion within a legally prescribed range . . . point to a single, consistent conclusion: *The judge's role in sentencing is constrained at its*

> *outer limits by the facts alleged in the indictment and found by the jury.*

122 S. Ct. at 2418. (Emphasis added). This statement is further consistent with this Court's holding also in *Harris* that:

> As the Court reiterated in Jones: "its is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." 526 U.S. at 248. *Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury trial, and reasonable-doubt components of the Fifth and Sixth Amendments.*

122 S. Ct. at 2415. (Emphasis added). Here, the judicial factfinding in the course of selecting a sentence does, in fact, implicates both the jury trial and reasonable doubt components of the Fifth and Sixth Amendments.

This court has not explicitly or expressly articulated this principle in connection with 21 U.S.C. §841(b)(1)(D) prosecutions or similar offense prosecutions. It is respectfully suggested that such an analysis by this court is merited as being worthy of the grant of this petition pursuant to Rule 10(c) of the Supreme Court Rules. The application of *Apprendi* by the court below, without the benefit of *Harris* which was issued subsequent to the decision of the court below raises an important question of federal law which has not been, but should be, settled by this court. Moreover, the opinion of the lower court conflicts with this Court's opinions in *Apprendi* and *Harris*.

CONCLUSION

For the foregoing reasons, petitioners LENWOOD MALACHI and DAVID FITZGERALD, pray that this Court grant their petition for writ of certiorari, vacate the judgment below, and remand this case to United States Court of Appeals for the Third Circuit with instructions to remand to the district court for the purpose of vacating the sentences and ordering a new sentencing hearing.

Respectfully submitted,

NEIL E. JOKELSON

August 28, 2002

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2393 & 00-2399

UNITED STATES OF AMERICA

v.

DAVID J. FITZGERALD
Appellant at No. 00-2393

LENWOOD MALACHI,
Appellant at No. 00-2399

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal Nos. 99-cr-00450-7 & 99-cr-00450-6
(Honorable Harvey Bartle, III)

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 13, 2001

Before: SCIRICA and BARRY, Circuit Judges,
and MUNLEY, District Judge*

(Filed: January 31, 2002)

---

* The Honorable James M. Munley, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

These drug trafficking cases require application of the rule stated in *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

At a bench trial, defendants Lenwood Malachi and David Fitzgerald were convicted of conspiracy to distribute marijuana. In its verdict, the District Court found defendants were guilty of distributing "large quantities of marijuana." The court made no more specific findings with respect to drug quantities. Before the trial, defendants and the government agreed that the District Court would make findings of drug quantity at sentencing.

Following the verdicts, but before sentencing, the United States Supreme Court decided *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The Court held, "'[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Id.* at 490 (quoting *Jones v. United States,* 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

As noted, the District Court made no findings at trial on specific drug quantities. Because of *Apprendi*, the government asked the court to supplement its findings to establish drug quantities, and to make, for these purposes, only such findings as could be established beyond a reasonable doubt. At sentencing, the District Court again stated defendants had trafficked "large quantities," but

declined to make a specific finding beyond a reasonable doubt with respect to quantity.

The relevant statute establishes different ranges of punishments depending on the amount of drugs involved. 21 U.S.C. § 841. The maximum punishment for trafficking less than fifty kilograms of marijuana is five years, or ten years if the defendant has previously been convicted of a felony drug offense. § 841(b)(1)(D). If there is more than one thousand kilograms of marijuana – which the government alleges represents the actual quantity distributed – the maximum prescribed sentence is life imprisonment. § 841(b)(1)(A).

The District Court made findings with respect to quantity only under the preponderance of evidence standard. The District Court found Malachi conspired to distribute 1400 kilograms of marijuana, and Fitzgerald conspired to distribute 2600 kilograms of marijuana, by a preponderance of the evidence.

As initially calculated, the guidelines for Malachi specified a range of 121-150 months; for Fitzgerald, 168-210 months. Because there was no finding of drug quantity beyond a reasonable doubt, the District Court believed its authority after *Apprendi* was constrained by the statutory maximum for trafficking less than fifty kilograms of marijuana. For this reason, it sentenced Malachi to five years, the maximum for such a quantity absent a prior felony drug conviction. Because Fitzgerald had a prior felony drug conviction, it sentenced him to ten years, the maximum permitted for trafficking under fifty kilograms of marijuana. Defendants appeal.

In *United States v. Williams,* 235 F.3d 858 (3d Cir. 2000), we held *Apprendi* does not apply where a relevant

factor raises the maximum statutory penalty, so long as the sentence actually imposed remains at or below the maximum applicable when the factor is not established beyond a reasonable doubt. *Id.* at 863. Because the District Court here imposed a sentence within the maximum statutory range for trafficking less than fifty kilograms of marijuana, *Apprendi* does not apply.

Defendants seek to avoid this conclusion by arguing that the District Court's verdict amounted to an acquittal of any charge that they conspired to traffic more than fifty kilograms of marijuana. It follows, they argue, that the District's finding of substantially greater amounts of marijuana for purposes of application of the sentencing guidelines – which raised their sentences up to the statutory maxima – amounted to double jeopardy, insofar as it negated the effect of the "acquittal." There is no basis, however, for defendants' claim that they were acquitted of trafficking more than fifty kilograms of marijuana.

Furthermore, an "acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts,* 519 U.S. 148, 157 (1997). Accordingly, it was appropriate to determine the applicable sentence (within the constraints imposed by the statute) based on an amount of marijuana found by a preponderance of the evidence, though not beyond a reasonable doubt. This is simply a consequence of the different standards of proof employed.

Defendants contend the lack of a specific finding on quantity bars conviction under § 841(b)(1)(D), which applies to trafficking less than fifty kilograms. They argue they can be convicted only under § 841(b)(4), which applies

to defendants who have "distribut[ed] a small quantity of marihuana for no remuneration," because their responsibility for more than "a small quantity" has not been established beyond a reasonable doubt. But the District Court expressly found at trial – beyond a reasonable doubt – that defendants conspired to distribute "large quantities" of marijuana – a finding inconsistent with application of § 841(b)(4). This was consistent with the evidence presented at trial.

Fitzgerald also contests the court's application of the higher statutory maximum by reason of a previous conviction for drug-related felonies. The basis for his argument is that the prior conviction – which Fitzgerald does not now contest – was not noted in the indictment, and was not established beyond a reasonable doubt at trial. In *Apprendi*, however, the Court excepted from its rule prior convictions: "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). The Court declined to overrule its previous decision that prior conviction need not be so treated. *See Almendarez-Torres v. United States,* 523 U.S. 224 (1998). Whatever misgivings the Court may have expressed about that decision in *Apprendi* are, for these purposes, irrelevant. The *Apprendi* Court expressly declined to overrule it, and we are therefore bound by it. 530 U.S. at 489-490.

Accordingly, the judgments of sentence will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2393 & 00-2399

UNITED STATES OF AMERICA

v.

DAVID J. FITZGERALD
Appellant at No. 00-2393

LENWOOD MALACHI,
Appellant at No. 00-2399

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal Nos. 99-cr-00450-7 & 99-cr-00450-6
(Honorable Harvey Bartle, III)

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 13, 2001

Before: SCIRICA and BARRY, Circuit Judges,
and MUNLEY, District Judge*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on December 13, 2001.

---

* The Honorable James M. Munley, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the judgments of the District Court entered August 11, 2000, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

DATED: January 31, 2002

Certified as a true copy and issued in lieu of a formal mandate on June 7, 2002.

Teste: /s/ Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

V.

LENWOOD MALACHI

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 99-450-6

Neil E. Jokelson, Esquire
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[X] was found guilty on count(s) I after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to distribute marijuana	9/30/98	I

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30

days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
206-42-7974

Defendant's Date of Birth:
11/11/51

Defendant's USM No.:
53219-066

Defendant's Residence Address:

FCI Schuylkill
PO Box 700
Minersville, PA 17954

Defendant's Mailing Address:

Same as above

8/9/00
Date of Imposition of Judgment

/s/ Harvey Bartle/III
Signature of Judicial Officer

HARVEY BARTLE III
Name and Title of Judicial Officer

August 11, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 60 months .

[X] The court makes the following recommendations to the Bureau of Prisons:

Court recommends drug treatment program. Court recommends defendant serve his sentence at FCI Fairton or Allenwood.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] a.m.[ ] p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By /s/ _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100.00**	**$**	**$**

[ ] If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g., equal, weekly, monthly, quarterly* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[X] The defendant shall forfeit the defendant's interest in the following property to the United States: $1,980,000.00

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): court finds drug quantity was proven by a preponderance of the evidence but

not beyond a reasonable doubt. Court finds defendant was not a supervisor.

Guideline Range Determined by the Court:

Total Offense 32

Criminal History I

Imprisonment 121 to 151 months

Supervised Release 2 to 3 years

Fine $10,000.00 to $ $100,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds

no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range:

upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following specific reason(s):

The sentence imposed is below the guideline range because the maximum sentence under 42 U.S.C. Section 841(b)(1)(D) is five years. See *Apprendi v. New Jersey* ___ U.S. ___, 120 S.Ct. 2348 (2000).

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

V.

DAVID J. FITZGERALD

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 99-450-7

Harry R. Scay, Esquire
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to distribute marijuana	9/30/98	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30

days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
206-42-7954

Defendant's Date of Birth:
11/9/51

Defendant's USM No.:
53215-066

Defendant's Residence Address:

FCI Schuylkill
PO Box 700
Minersville, PA 17954

Defendant's Mailing Address:

Same as above

8/9/00
Date of Imposition of Judgment

/s/ Harvey Bartle/III
Signature of Judicial Officer

HARVEY BARTLE III.
Name and Title of Judicial Officer

August 11, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 120 months .

[X] The court makes the following recommendations to the Bureau of Prisons:

Court recommends drug treatment program.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ [ ] a.m.[ ] p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By /s/ _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$ $25,000.00	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $_____$.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[X] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[X] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or (assessment)

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly* installments of $ _____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant is to pay fine in the amount of $25,000.00 within 60 days without interest.

[ ] The defendant shall pay the cost of prosecution.

[X] The defendant shall forfeit the defendant's interest in the following property to the United States: $1,080,000.00

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Court finds drug quantity was proven by a preponderence of the evidence but not beyond a reasonable doubt.

Guideline Range Determined by the Court:

Total Offense 35

Criminal History I

Imprisonment 168 to 210 months

Supervised Release _____ to 10 years

Fine $15,000.00 to $ $150,000.00

Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[X] The sentence departs from the guideline range:

upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following specific reason(s):

The sentence imposed is below the guideline range because the maximum sentence under 42 U.S.C. Section 841(b)(1)(D) is ten years. See *Apprendi v. New Jersey* ___ U.S. ___, 120 S.Ct. 2348 (2000).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	99-CR-450-6
	)	99-CR-450-7
vs.	)	
	)	Philadelphia, PA
LENWOOD MALACHI,	)	February 25, 2000
AND DAVID J.	)	3:00 p.m.
FITZGERALD,	)	
Defendants.	)	

TRANSCRIPT OF FINDING OF FACT HEARING
BEFORE THE HONORABLE HARVEY BARTLE, III
UNITED STATES DISTRICT JUDGE

* * *

The Court – Findings of Fact

[3] THE COURT: You may be seated. Before the Court this afternoon is the case of United States of America versus Linwood Malachi and David J. Fitzgerald, criminal numbers 99-450-6 and 99-450-7. This criminal action was tried by the court without a jury. Upon consideration of the evidence presented at trial and the arguments and written submissions of the parties, the Court makes the following special findings of fact in accordance with Rule 23C of the Federal Rules of Criminal Procedure.

The government has proven the following facts beyond a reasonable doubt. Defendants, Lenwood Malachi and David J. Fitzgerald entered into a single agreement or conspiracy involving themselves, Clinton – Clifton Cato, co-defendant, Cecilia Perez-Espinoza, also known as Cecilia Fragoso, Javier Fragoso, Miguel Sosa-Rodriguez,

known as Miguel Sosa, Ramone Sosa-Rodriguez, known as Ramone Sosa, Albert Ruben Sosa-Mendoza, known as Ruben Mendoza, and Charlotte McLaughlin, and other persons named and unnamed in the indictment. The unlawful objective of the conspiracy was to traffic, in large quantities, marijuana, a controlled substance, and to make a profit in doing so.

Defendants, Malachi and Fitzgerald each entered into the conspiracy knowingly and with intent to further its unlawful purpose. Defendant, Malachi joined the conspiracy at its inception in late 1993 and actively participated in the [4] conspiracy through at least early 1996. The defendant, Fitzgerald, did not become a part of the conspiracy until 1994, when defendant Malachi brought him into it. Fitzgerald actively participated as a co-conspirator from that time until its conclusion in September, 1998.

Defendants, Malachi and Fitzgerald, as well as Cato, were located in the Philadelphia area. They pooled their money to purchase large quantities of marijuana in and around Tucson, Arizona, from various suppliers, including Cecilia Fragoso, Javier Fragoso, Miguel Sosa, Ramone Sosa, and Ruben Mendoza, who were also part of the conspiracy. The marijuana was transported to Philadelphia for resale by Malachi, Fitzgerald, and Cato.

Sometimes Malachi, Fitzgerald, and Cato traveled to Tucson, Arizona, and consummated the purchases there, and sometimes Malachi and Fitzgerald provided money to Cato to do the purchasing for them. Malachi, Fitzgerald, and Cato engaged couriers to bring the marijuana from Arizona to Philadelphia. The couriers included Charlette McLaughlin, Richard Bessinger, Sr., Richard Bessinger,

Jr., Diann Allmond, Fred Ohlin, Joann Genovese, Anthony Genovese, Michael Pottillo, Mike Little, and Big Boy.

Cato, Malachi, and Fitzgerald shared the services of McLaughlin, while Mike Little and Big Boy were primarily in the employ of Malachi. On various occasions, Cato, Malachi, and [5] Fitzgerald, as well as other – as well as certain suppliers, met in Philadelphia and elsewhere to further the conspiracy. Marijuana was, at time, stored in the home of Malachi on Mt. Pleasant Avenue in the Mt. Airy section of Philadelphia.

Fitzgerald used his cleaning establishment at 11th and Cumberland Streets in Philadelphia to store money obtained and used in furtherance of the conspiracy. Malachi, Fitzgerald, and Cato also kept in frequent contact with each other by telephone during the course of the conspiracy. Cato kept, in an address book, the phone numbers where he could reach Malachi and Fitzgerald.

On November 25th, 1995, Fitzgerald was arrested at the airport in Las Vegas, Nevada, on his way back to Philadelphia. He was returning from Tucson, Arizona, where he had made a buy of marijuana. The quantity purchased, however, was less than he had originally intended. When arrested, he had on his person some $46,999 in cash and empty suitcases containing marijuana residue. In a later search of his cleaning establishment in Philadelphia, approximately $30,000 in cash was found. These cash proceeds were also involved in the marijuana trafficking scheme.

Fitzgerald, using the name David Mendoza, also made two wire transfers of money to Cato in Jamaica through Western Union. One wire transfer was for $800 and one

for $850. These wire transfers represented commissions due from Fitzgerald to [6] Cato on marijuana transactions.

While Malachi and Fitzgerald were not part of the conspiracy for its entire existence, the law does not require their involvement for its entire length in order for them to be found guilty of conspiracy. In addition, to be a co-conspirator, one does not have to have full knowledge of all the operations of the conspiracy.

Some suppliers were dropped and others added during the time of the conspiracy. Certain suppliers were, at times, competitors of each other. The sometimes competitive nature of certain suppliers who were conspirators does not negate the existence of the single conspiracy which included defendants, Malachi and Fitzgerald.

There were no conspiracies working at cross purposes with each other. Moreover, a single conspiracy, as here, may involve numerous suppliers operating under the aegis of a common core group. That is, Cato, Malachi, and Fitzgerald. The Court has found credible the testimony of accomplices, Clifton Cato and Miguel Sosa, even though they have plea agreements with the government. Their testimony was supported by supplemental, documentary, and other evidence in the record.

The defendants have failed to demonstrate any material variance between the allegations in the indictment and the trial evidence, or that any variance affected their substantial rights. To the extent any variance existed, the [7] evidence narrowed the basis for a conviction.

Accordingly, the Court finds, beyond a reasonable doubt, that the defendant, Lenwood Malachi, is guilty of

count one of the indictment. That is, he is guilty of conspiracy to distribute marijuana in violation of Title 21, United States Code, Section 846. Accordingly, the Court finds, beyond a reasonable doubt, that the defendant, David J. Fitzgerald, is guilty of count one of the indictment. That is, he is guilty of conspiracy to distribute marijuana in violation of Title 21, United States Code, Section 846.

Anything further from the Government?

MR. BENTLEY: There's the matter of detention, Your Honor.

MR. SEAY: Your Honor, there –

THE COURT: All right.

MR. SEAY: – there is – I'd like to suggest to the Court, the Court stated, in it's findings, that the defendant, Fitzgerald, was arrested in Arizona. He was not arrested, he was questioned.

THE COURT: I beg your pardon. You're absolutely right. The findings are amended to say that he was questioned in Arizona, as opposed to being arrested. Thank you.

MR. BENTLEY: Your Honor, it's the Government's position that detention of both defendants is mandatory, under Title 18, United States Code, Section 3143, sub (a), sub (2). [8] That provision provides that the judicial officer shall order that a person who has been found guilty of various enumerated offenses be detained. The enumerated offenses are spelled out in Section 3142(a), (b), and (c), and (c) of that section includes offenses for which a maximum term of imprisonment of ten

years or more is prescribed in the Controlled Substances Act.

Both of these defendants were convicted of defenses – of offenses that had maximum sentences in excess of ten years under the Controlled Substances Act. Accordingly, 3143(a)(2) applies, and it requires that the defendants be detained unless two requirements are met. The first is (2)(a)(1), the judicial officer finds that there is a substantial likelihood that a motion for acquittal or new trial will be granted. And, the second requirement is that the judicial officer finds, by clear and convincing evidence, that the person is not likely to flee or pose a danger to any other person or the community.

Now, it is the government's position that, following their conviction, both of them are unable to demonstrate, by clear and convincing evidence, that they are unlikely to flee or to deal drugs, but I think the Court does not need to reach that issue, because detention is mandatory under the first prong of this provision, which is – there's a – the – this Court, the Government submits, cannot find that there's a [9] substantial likelihood that a motion for acquittal or new trial will be granted. To do that, we would submit, the Court would have to find that it had committed error in its verdict of guilt against these defendants.

THE COURT: All right. I'll hear from counsel on that.

MR. SEAY: Thank you, Your Honor.

THE COURT: Mr. Seay?

MR. SEAY: Your Honor, – and, it is clear, as the United States Attorney has said, and I am quoting again, that, if a person is likely to flee or pose a danger to the

community, I suggest to the court that Mr. Fitzgerald, in this – in these proceedings, attended every proceeding, even on a day when we were closed down for a snow day. When I could not reach him, he came to the courthouse.

Moreover, in this case, there were no weapons found, there's no guns, no threats, and there's nothing to indicate to [sic] he will not stand and answer to the sentence, with conditions imposed by the Court. And, –

THE COURT: But, see, that's not the test. That's one prong that I also have to determine that there's a substantial likelihood that a motion for acquittal or new trial will be granted.

MR. SEAY: That's one of them, yes, sir.

THE COURT: It was a – no, it's a two prong test. [10] So, that's the crucial question. Even if I find that you're correct, the question becomes is whether there is a substantial likelihood that a motion for acquittal or new trial will be granted.

MR. SEAY: Yes, sir.

THE COURT: Mr. Jokelson?

MR. JOKELSON: The two prong test which the Government refers to – it seems to me that we'd have the burden of overcoming the first prong, and the problem that I'm facing is the language of substantial likelihood. The – the Government has suggested to the Court that, in order to meet that prong, this Court would, in effect, have to overrule itself on findings that it's announced today in the court.

It seems to me that we have raised serious and substantial issues which may well result in a reversal or the matter to be appealed to the Court of Appeals, because it seems to me that the Court's finding of no multiple conspiracies acting at cross purposes with one another may be determined to be an issue of law for which the Third Circuit could exercise its plenary jurisdiction.

Although it's evident that the Court believes and this Trial Court believes that it's acting in accordance with established law, and therefore it seems to me to be unlikely that this Court would believe that there is a likelihood that its decision in this case would be overturned by the Third [11] Circuit, I'm not sure that the phrase "substantial likelihood" in fact requires a finding of a probability in that regard. And, what I would suggest to the Court is that we have made substantial and reasonable arguments whereby reasonable persons, that is jurors, could differ with Your Honor's finding as a matter of law and still accept what may be purely factual findings made by the Court.

And, it's on that basis that I'd ask the Court to reach the second prong. And, with respect to the second prong, I think there's very little question that – as Mr. Seay said for his client, that – I think the same things apply for Mr. Malachi. Both of these defendants have always cooperated, they've both been out of the jurisdiction with permission of the Court, they've always been responsive, and there certainly is no indication of any intent to flee.

And, with respect to Mr. Malachi, he has daughters, and he has a wife in Philadelphia. And, although he has substantial business interests – or his substantial business interests, to the extent that he has one, – and it is –

it's a permanent one, he's in Atlanta – there's no suggestion that I think that he would be – flee from justice. So, it's on that basis I would ask the Court to consider letting Mr. Malachi stay at liberty, and I think the same argument would probably apply to Mr. Fitzgerald as well.

THE COURT: Mr. Bentley?

[12] MR. BENTLEY: With respect to Mr. Jokelson, I think that he's attempting to change the statutory standard, and the statutory standard does not refer to likelihood of success on appeal or substantial issues on appeal. It refers to – this Court must find there's a substantial likelihood that a motion for acquittal or a new trial would be granted.

The motion for acquittal would be under Rule 29. This Court would have to find – it would have to take all of the evidence in the light most favorable to the Government and find that no rational trier of fact could have found the elements of the offense to have been made out. If it was a motion under Rule 33 for a new trial, this Court would have to find a substantial error of law that so infected the trial as to lead to a miscarriage of justice, and the Government submits that this – this Court should not so find.

MR. JOKELSON: If I may, Your Honor, –

THE COURT: You may.

MR. JOKELSON: – I think the Government misapprehends the nature of my argument. While the motion for judgment of acquittal would, I think, be directed to this Court, the new trial can be granted on the Appellate – in the Appellate process. And, it – what I'm suggesting is that the statute, as I read it, does not con – does not confine itself to the granting of a new trial by the

trial judge, but talks about the granting of a new trial without reference to the [13] Tribunal. And, that Tribunal, it seems to me, would be the Court of Appeals as well as this court.

THE COURT: All right. I have before me Title 18, United States Code, Section 3142. I find that there is little likelihood that a motion for acquittal or a new trial would be granted. Therefore, the defendants have not made out the first prong under Section 3143(a)(2)(a)(1), and therefore I will – the statute requires me to order the defendants to be detained immediately pending sentencing an appeal. Anything further at this time?

MR. BENTLEY: I think that we discussed previously the issue of forfeiture, and parties in the Court were in agreement that the appropriate procedure was to handle that at the time of sentencing. Obviously, since the whole trial was before the Court, the issues of forfeiture would be before the Court at that time as well.

THE COURT: All right.

MR. BENTLEY: Other than that, there's nothing further from the Government.

MR. SEAY: That's my understanding, Your Honor.

THE COURT: So, there's nothing further on the forfeiture issue, is what you're telling me?

MR. BENTLEY: Not at this time. It would be at sentencing.

THE COURT: Oh, we're going to do it at sentencing? [14] All right.

MR. JOKELSON: I thought that's we had agreed on.

THE COURT: All right. Very good. Thank you very much.

VOICE: You can't take my dad away.

THE COURT: We'll let counsel know about the sentencing date –

MR. JOKELSON: Yes, sir.

THE COURT: – shortly.

MR. JOKELSON: Yes, sir.

THE COURT: a pre-sentence report will be prepared. We'll order that, and we'll have sentencing, and – excuse me, I think what we'll do – let me – we'll set sentencing for June 2nd, 19 – 2000 at 12:30 p.m. for Mr. Malachi and 1:00 for Mr. Fitzgerald.

MR. JOKELSON: I'm sorry, I –

THE COURT: June 2nd. On June 2nd, sentencing.

MR. JOKELSON: June 2nd.

THE COURT: June the 2nd – the second day of June, 2000.

MR. JOKELSON: I got that. What time, your Honor? I'm sorry.

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2393 & 00-2399

UNITED STATES OF AMERICA

v.

DAVID J. FITZGERALD
Appellant at No. 00-2393

LENWOOD MALACHI,
Appellant at No. 00-2399

(D.C. Crim Nos. 99-cr-00450-7 & 99-cr-00450-6)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO and FUENTES,
Circuit Judges, and MUNLEY*, District Judge

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who particiapted in the decision of this Court and to all the other available circuit judges of the circuit in regular active servcie, and no judge who concurred in the decision

---

* The Honorable James M. Munley, United States District Judge for the Middle Ditrict of Pennsylvania, who sat by designation, as to panel rehearing only.

having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Dated: May 30, 2002

LD/cc: ✓ Neil E. Jokelson, Esq.
Eric Bentley, Esq.
Mark J. Ehlers, Esq.

UNITED STAETS DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	99-CR-00560-06, 07
Plaintiff,	)	
v.	)	
LENWOOD MALACHI and DAVID J. FITZGERALD, a/k/a DAVID MENDOZA,	)	Philadelphia, PA
	)	August 9, 2000
Defendants.	)	1:30 p.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE HARVEY BARTLE, III
UNITED STATES DISTRICT JUDGE

* * *

[32] MS. LEFEBER: And, Your Honor, for the record, and excuse me if other counsel have already stated the objection based on *Apprendi* for any enhancement or additional sentence based on the relevant conduct. I don't believe that *Apprendi* would allow that. As Your Honor recognized, there's an issue as to whether five years is maybe the maximum based upon this record that the defendant can be sentenced to. And, I would submit that evidence post-indictment period under *Apprendi* cannot be – the record cannot be reopened and not presented at this time, because it affects the maximum sentence to which the defendant is subject.

MR. BENTLEY: Your Honor, we would request that the *Apprendi* issues and the supplemental fact findings, both the issue of whether the Court will enter

them and then the fact findings themselves, if the Court does enter them, that these be resolved before we get into the sentencing issues. The court – the Government agrees with Ms. Lefeber that we will not open – reopen the record for purposes of the Court's *Apprendi* findings, and we don't intend to.

So, counsel have started discussing apples and oranges, two different issues. We would request that we be allowed to postpone our response on the particular sentencing enhancement issues, which does include evidence, until after the *Apprendi* issue has been resolved.

THE COURT: All right. Anything further on that issue?

[33] MR. JOKELSON: No, Your Honor.

MS. LEFEBER: No, Your Honor.

THE COURT: All right. The parties have argued the *Apprendi* matter and the issue of drug quantity. At the time of the trial, which was conducted non-jury by consent of the parties, it was agreed that the issue of drug quantity would be deferred until the time of sentencing, if the Court found the defendant's guilty of conspiracy to distribute marijuana. However, there was no discussion at that time about the standard of proof that would be applied should the Court be called upon at the sentencing hearing to decide the amount of drugs involved.

On February 25th, 1999, the Court found defendants Lenwood Malachi and David Fitzgerald guilty beyond a reasonable doubt of conspiracy to distribute marijuana in violation of Title 21 United States Code Section 846. While the Court found beyond a reasonable doubt that the

conspiracy involved large quantities of marijuana, it did not make any specific findings of drug quantity.

Between the time of the trial and the sentencing hearing, which is being held today, the Supreme Court of the United States decided the case of *Apprendi versus New Jersey,* found at 120 Supreme Court 2348. In that case, which was decided on June 26th, 2000, the Court held, and I quote, "Other than the fact of a prior conviction, any fact that increases [34] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

The maximum penalty for conspiracy to distribute less than 50 kilograms of marijuana is five years in prison pursuant to Title 21 Untied States Code Section 841(b)(1)(D), unless the defendant has a prior final conviction for a felony drug offense in which case the maximum penalty is ten years in prison. If larger drug quantities are involved, the maximum penalties are significantly higher.

Since the quantity of drugs involved here can affect the maximum penalty, *Apprendi* teaches that the quantity of drugs is a jury issue or an issue for the Court, if it is a non-jury case, and it must be proven beyond a reasonable doubt. However, if the finding concerning the amount of drugs does not affect the maximum penalty, we conclude that under *Apprendi* the Court may make the appropriate finding during the sentencing hearing and may do so by a preponderance of the evidence.

The Court now finds by a preponderance of the evidence that the defendant Lenwood Malachi conspired to distribute some 3,154 pounds of marijuana; that is, some 1,400 kilograms of marijuana. So that the record is clear,

the Court finds that the Government has not proven this drug quantity beyond a reasonable doubt.

The Court finds by a preponderance of the evidence that [35] the defendant David Fitzgerald conspired to distribute some 5,841 pounds of marijuana; that is, some 2,600 kilograms of marijuana. Again, so that the record is clear, the Court finds that the Government has not proven this drug quantity beyond a reasonable doubt.

The Court also finds beyond a reasonable doubt that the defendant David Fitzgerald committed the crime in issue after a prior conviction for a drug felony offense had become final. Specifically, in June 1986, he was convicted in the Superior Court of New Jersey after a plea of guilty of the crime of possession of marijuana with the intent to distribute.

Since the Court has found beyond a reasonable doubt that a conspiracy to distribute quantities of marijuana existed but has found the specific quantities enumerated above by a preponderance of the evidence and not beyond a reasonable doubt, the maximum sentence that can be imposed on defendant Lenwood Malachi is five years in prison under Title 21 United States Code Section 841(b)(1)(D). Because the Defendant David Fitzgerald has a prior drug conviction, his maximum sentence under Title 21 United States Code Section 841(b)(1)(D) is ten years in prison.

All right. We'll proceed now to the sentencing of Mr. Malachi. I'll hear from the Government.

MR. BENTLEY: Your Honor, I must confess that I'm not entirely clear as to the Court's finding. Has

the Court found [36] that it will not make supplemental findings as to whether –

THE COURT: I've made it quite clear, Mr. Bentley. I have found the quantity by a preponderance of the evidence and not beyond a reasonable doubt.

MR. BENTLEY: May I ask the Court whether – is the Court declining to make findings as to whether or not either defendant conspired to distribute in excess of 100 kilograms beyond a reasonable doubt?

THE COURT: The Court has made its finding, Mr. Bentley, that the Government has not proven beyond a reasonable doubt any specific drug quantity. The Government has proven by a preponderance of the evidence the quantities that I have stated.

MR. BENTLEY: For the purposes –

THE COURT: The Government has failed to prove any specific drug quantities beyond a reasonable doubt. It has proved the drug quan – the Government has also proved beyond a reasonable doubt that there were – that there was marijuana distributed. So, you have proved that a quantity of marijuana was distributed beyond a reasonable doubt. You have not proved a specific amount beyond a reasonable doubt. So, you certainly have proven that marijuana was distributed beyond a reasonable doubt, so you're in the zero plus to less than 50 kilograms category, –

* * *

[53] THE COURT: Mr. Malachi, you've been convicted of conspiracy to distribute marijuana in violation of Title 21 United States Code Section 846. I find that the

base offense level under the sentencing guidelines is 32. As I stated earlier, I find by a preponderance of the evidence that you were involved in a conspiracy, you knew about and were involved in the distribution of between 1,000 and 3,000 kilograms of marijuana.

I decline to find that you were a manager or supervisor of criminal activity involving five or more participants, so I will not add three additional points, for a total offense level [54] of 32. I find you have no criminal history points for a criminal history category of I.

Under the sentencing guidelines, you could be sentenced to between 121 and 151 months in prison. That's the minimum sentence under the guidelines, which would be about ten years. Nonetheless, as a result of *Apprendi versus New Jersey*, the maximum to which you are subject is five years in prison under Title 21 United States Code Section 841(b)(1)(D).

Because of the drug quantity involved, I'm going to commit you into the custody of the Attorney General of the United States for a period of imprisonment of five years, to be followed by five years of supervised release. No fine will be imposed because of your inability to pay. I order you to pay immediately a special assessment of $100.

I advise you, Mr. Malachi, of your right to appeal your sentence to the United States Court of Appeals for the Third Circuit. If you cannot afford counsel, the Court will appoint counsel to represent you. And, if you wish a notice of appeal to be entered on your behalf today, you may ask the deputy clerk to do so, and she will enter a notice of appeal on your behalf.

* * *

[63] THE COURT: Well, that's certainly understandable. Mr. Fitzgerald, you've been found guilty of conspiracy to distribute marijuana in violation of Title 1 (sic) United States Code Section 846. The base offense level in this case under the sentencing guidelines is 32.

[64] I find that you were involved in a conspiracy and knew about it, were involved in the marijuana trade to the extent of between 1,000 and 3,000 kilograms. I find you were a manager or supervisor of drug couriers in a criminal activity involving five or more participants for an additional three points, for a total of 35.

The obstruction of justice issue is not being pressed at this time by the Government, so there will be no enhancement on those grounds.

The total offense level in this case is 37 (sic). Under the sentencing guidelines, you have no criminal history points, for a criminal history category of I. Under the sentencing guidelines, –

MR. BENTLEY: Your Honor, I think the Court may have misspoke. I think it's 35 without the –

MR. SEAY: Yes, it is 35.

MR. BENTLEY: – without the obstruction.

MS. LEFEBER: Right.

THE COURT: I'm sorry, 35.

MR. SEAY: Without the obstruction.

THE COURT: You're absolutely right.

MR. SEAY: It's 35, Your Honor.

THE COURT: I apologize. Thirty – a total offense level of 35. No criminal history points under the sentencing guidelines, and a criminal history category of I. Under the [65] guidelines, putting aside for the moment the *Apprendi* decision, you could have been sentenced to between 210 and 262 months in prison. Sorry, that's not correct. It's 168 – between 168 and 210 months in prison.

There was also a mandatory minimum sentence of 20 years because of your prior drug offense conviction in New Jersey in 1986 to which I referred earlier in the hearing. Nonetheless, as a result of the Supreme Court's decision in *Apprendi versus New Jersey*, the maximum penalty in this case is ten years in prison.

Under the totality of the circumstances, I'm going to commit you into the custody of the Attorney General of the United States for a period of imprisonment of 120 months; that is, 10 years, to be followed by 5 years of supervised release. I'm going to impose a fine of $25,000 to be paid within 60 days without interest. I also order you to pay immediately a special assessment of $100.

I advise you, Mr. Fitzgerald, of the right to appeal your sentence to the United States Court of Appeals for the Third Circuit. If you cannot afford counsel, the Court will appoint counsel to represent you. If you wish a notice of appeal entered on your behalf, you may indicate that today to the deputy clerk and she will enter a notice of appeal on your behalf.

MR. SEAY: We do so, Your Honor.